A claimant, who worked as an on-call employee during his base period was ineligible for partial unemployment benefits in any weeks during his benefit year in which he performed any hours of work. However, he was eligible for benefits pursuant to G.L. c. 151A, §§ 29(a) and 1(r)(2), during the weeks in which he had no work.

Board of Review
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Chairman
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Member

Issue ID: 0078 9232 66

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to deny unemployment benefits. Benefits were denied on the ground that the claimant was still employed, and thus disqualified pursuant to G.L. c. 151A, §§ 29(a), (b), and 1(r).

The claimant filed a claim for unemployment benefits with an effective date of December 25, 2022, which was denied in a determination issued by the agency on January 19, 2023. The claimant appealed to the DUA Hearings Department. Following a hearing on the merits, the review examiner affirmed the agency's initial determination in a decision rendered on March 25, 2023. The claimant sought review by the Board, which dismissed his appeal because it was filed after the 30-day statutory deadline set forth under G.L. c. 151A, § 40, and the claimant appealed to the District Court pursuant to G.L. c. 151A, § 42.

On October 4, 2023, the District Court ordered the Board to review the case on the merits. Although we continue to maintain that we do not have jurisdiction to review this case, we have complied with the District Court's order.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant was an on-call employee and was not entitled to partial unemployment benefits in any week in which he worked part-time hours, is supported by substantial and credible evidence and is free from error of law.

After reviewing the recorded testimony and evidence from the hearing, the review examiner's decision, the claimant's appeal, the District Court's Order, and the DUA's electronic records keeping system, UI Online, we affirm in part and reverse in part the review examiner's decision.

Findings of Fact

The review examiner's findings of fact are set forth below in their entirety:

1. Since approximately 2019, the claimant has worked intermittently for the employer, a road marking company.

2. The claimant's most recent period of employment began on February 1, 2021.

3. Since February 1, 2021, the claimant has worked for the employer as a per diem laborer.

4. As a per diem employee, the claimant was not guaranteed any hours and his schedule varied depending on the employer's needs.

5. The claimant's base rate of pay is $23.00 per hour.

6. The employer offers the claimant shifts via text message.

7. The claimant filed a claim for unemployment benefits with an effective date of December 25, 2022.

8. The claimant's weekly benefit amount was determined to be $409.00 with an earnings disregard of $136.33.

9. During the week beginning January 1, 2023, the claimant worked 10 hours for the employer.

10. During the week beginning January 8, 2023, the claimant worked 18.5 hours for the employer.

11. During the week beginning January 15, 2023, the claimant worked 11 hours for the employer.

12. During the week beginning January 22, 2023, the claimant worked 8 hours for the employer.

13. During the week beginning January 29, 2023, the claimant worked 5.7 hours for the employer.

14. During the week beginning February 5, 2023, the claimant worked 3.25 hours for the employer.

15. During week beginning February 12, 2023, the claimant was not offered work by the employer.

16. During the week beginning February 19, 2023, the claimant worked 2.9 hours for the employer.

17. During the week beginning February 26, 2023, the claimant was not offered work by the employer.

18. As of March 9, 2023, the date of the unemployment hearing, the claimant continues to work for the employer on a per diem basis.

Ruling of the Board

We review the record and the decision made by the review examiner to determine: (1) whether the findings are supported by substantial and credible evidence; and (2) whether the review examiner's conclusion is free from error of law. Upon such review, the Board adopts the review examiner's findings of fact and deems them to be supported by substantial and credible evidence.

Inasmuch as the findings show that, during his base period, the claimant worked *per diem* on an as-needed basis, we agree that he is not eligible for any benefits in any week that he worked some hours. *See* Town of Mattapoisett v. Dir. of the Division of Employment Security, 392 Mass. 546, 549 (1984). However, Findings of Fact ## 15 and 17 provide that the claimant did not work at all during the weeks beginning February 12, 2023, and February 26, 2023. Therefore, he is entitled to total unemployment benefits during these two weeks.

We, therefore, conclude as a matter of law that the review examiner's conclusion that the claimant was not entitled to benefits pursuant to G.L. c. 151A, §§ 29 and 1(r)(1), during any week in which he performed any work, is based on substantial evidence and is free from any error of law affecting substantive rights. We further conclude that, pursuant to G.L. c. 151A, §§ 29(a) and 1(r)(2), he was eligible for benefits in any week that he performed no work because he was in total unemployment.

The review examiner's decision is affirmed in part and reversed in part. The claimant is denied benefits for the period from January 1, 2023, through February 11, 2023, during the week beginning February 19, 2023, and during the period from March 5, 2023, through April 15, 2023. The claimant is eligible for benefits for the weeks beginning February 12, 2023, and February 26, 2023, as well as beginning April 16, 2023, if otherwise eligible.

Charlene A. Stawicki

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 29, 2024

Charlene A. Stawicki, Esq.
Member

Michael J. Albano
Member

Chairman Paul T. Fitzgerald, Esq. did not participate in this decision.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed)

The last day to appeal this decision to a Massachusetts District Court is thirty days from the mail date on the first page of this decision. If that thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the business day next following the thirtieth day.

To locate the nearest Massachusetts District Court, see:
www.mass.gov/courts/court-info/courthouses

Please be advised that fees for services rendered by an attorney or agent to a claimant in connection with an appeal to the Board of Review are not payable unless submitted to the Board of Review for approval, under G.L. c. 151A, § 37.

MR/rh